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E.O. 12958: DECL: 10/04/2016  
TAGS: [EINV](#) [EPET](#) [ETRD](#) [EC](#)  
SUBJECT: OCCIDENTAL FOCUSES ARBITRATION AGAINST GOE; GOE  
DELAYS NAMING ARBITER

Classified By: DCM Jeff Brown. Reasons 1.4 b and d

¶1. (C) Summary: Occidental Petroleum (Oxy) is dropping its arbitration case against Petroecuador while maintaining its case against the Government of Ecuador (GOE) to facilitate it management of the arbitration. In addition, the GOE has stated it will not appoint its arbiter by Oct. 12, as required by the arbitration rules. With presidential elections scheduled for October 15, the GOE argues (speciously) it must first consult with the president-elect before naming an arbiter. Post is disappointed but unsurprised by the GOE delay, which many will likely view as a lack of respect for the arbitral process. Post recommends that USG officials meeting this week with Trade Minister Peribonio note that this apparent decision makes generating positive movement on the trade agenda with Ecuador that much harder. End Summary.

Oxy Drops Petroecuador Case to Focus on GOE  
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¶2. (SBU) Occidental Petroleum has dropped its international arbitration case against the Ecuador's state oil company Petroecuador, but at the same time will continue to press its case against the GOE. When it initially filed for arbitration, Oxy was simultaneously pursuing two cases, one against the GOE and the other against Petroecuador. The case against the GOE was based on the U.S.-Ecuador Bilateral Investment Treaty, while that against Petroecuador was based on its contract, which (as noted below), created complications for Oxy's management of the arbitration. In withdrawing the case against Petroecuador, Oxy maintained that it has the right to pursue a separate arbitration at a later date.

¶3. (SBU) Oxy told the Embassy that it had been discussing internally for some time the possibility of setting aside the Petroecuador case. The decision to withdraw the claim against Petroecuador was a legal decision that accelerates the case against the Government of Ecuador, clarifies the legal situation, and removes the opportunity for the GOE and Petroecuador to play off each other in ICSID. In taking this step, Oxy believes a number of issues will be clarified:

-- Venue: Oxy's agreement with Petroecuador specifies that the venue for arbitration would be Quito. Although this reportedly contradicts ICSID rules, Oxy does not want to risk having ICSID okay the Quito venue, and then have the GOE arbitration forced into a Quito venue as well.

-- Provisional Remedies: the Petroecuador agreement specifies 1995 ICSID rules that do not specifically call for

a schedule for information exchange on provisional measures in advance of forming a tribunal. The case against the GOE would fall under 2006 rules that empower ICSID to establish this type of briefing calendar for exchange of information on provisional remedies prior to formation of a tribunal. This gains Oxy about a month and half in obtaining provisional remedies. Indeed, Oxy has requested and ICSID has sent a letter to the GOE regarding setting a schedule for this.

-- Prevents reasonable doubt: If Petroecuador and the GOE are both arguing it is the other's fault, or if the tribunal is uncertain which of the two are at fault, this could be construed as reasonable doubt.

-- Stronger argument: Since the Minister of Energy was responsible for the caducity statement; Oxy sees the argument against GOE as stronger.

¶4. (SBU) Oxy has not ruled out a case against Petroecuador in the future, but Oxy representatives are not sure it would add much (it would entail more legal fees and time, and any assets that might be attached are really GOE assets).

#### Ecuador,s Attorney General Delays Naming Arbiter

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¶5. (U) On October 2, Attorney General Borja sent a letter to ICSID noting Ecuador,s upcoming elections and stating that the GOE would consult with incoming officials before naming an arbiter. Borja's letter did not state when Ecuador would name its arbiter and simply noted that elections will be held on October 15. However, it is quite possible that Ecuador will not elect a president until the second round of elections on November 26. Under ICSID rules, the GOE has

until October 12 to name its arbiter. Oxy has already stated, in its letter to ICSID withdrawing the Petroecuador case, that if the GOE does not name its arbiter by October 12, Oxy would request that ICSID appoint the arbiter, as allowed under ICSID rules.

¶6. (U) Press reports on the two new developments in Ecuador have generally been fairly even-handed, although some include quotes from President Palacio saying that Oxy,s decision to drop the Petroecuador case is "a victory for the people that should be celebrated, news that is full of hope and joy for the nation." Most reports note that Oxy is dropping the Petroecuador case to focus on the case against the GOE, and some quote Ecuadorian lawyers who believe Oxy's move actually strengthens their case.

¶7. (C) Comment: We are disappointed but unsurprised by the apparent delay in naming an arbiter. It is consistent with the GOE's pattern on this issue over the past year -- delay, obfuscate, avoid actions that could be politically criticized and seek to push decisions further down the road. The GOE is not taking the minimal step it could have taken to show respect for the arbitral process )- appointing the arbitrator that it is entitled to name. At the same time, the action is not surprising because of the pending elections and the desire of current GOE officials to avoid criticism or possibly retribution from the next administration.

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